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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO DIVISION)

1 FINJAN LLC,

Case No. 3:14-cv-04908-JD

2 Plaintiff,

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**FINJAN LLC'S OPPOSITION TO PALO
ALTO NETWORKS' MOTION TO
CHANGE CASE SCHEDULE**

1 PALO ALTO NETWORKS, INC.,

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Date: October 5, 2023
Time: 10:00 a.m.
Hon. James Donato
Ctrm: 11, 19th Floor

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Defendant.

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1 **STATEMENT OF ISSUES**

2 Whether PAN has shown “good cause” to amend the case schedule, including continuing
 3 the trial by seven months to October 28, 2024.

4 **MEMORANDUM OF POINTS AND AUTHORITIES¹**

5 **I. INTRODUCTION**

6 PAN seeks yet again to delay this almost 9-year-old case another 7 months. In so doing,
 7 PAN seeks to move the trial date this Court has already set. The Court’s standing order, however,
 8 instructs the parties that “[o]nce assigned, the trial date will not be changed or continued absent
 9 good cause in the interest of justice” and “[c]ounsel and parties should assume that the trial date
 10 will not be moved.” But PAN fails to contend, let alone show, that there is “good cause,” pursuant
 11 to Rule 16(b)(4) of the Federal Rules of Civil Procedure and paragraph 4 of this Court’s Standing
 12 Order for Civil Cases, to modify the schedule including resetting dates for dispositive and *Daubert*
 13 motions and continuing the trial date by more than 7 months to October 28, 2024.

14 Even if it had addressed the Court’s standing order, which it did not, PAN cannot show
 15 good cause to extend the schedule. Nor can PAN show that it is in the interest of justice to once
 16 again delay Finjan’s day in court, which is long overdue. PAN fails to account for the harm to
 17 Finjan’s patent rights that would result from yet another 7-month delay to this case already
 18 pending for nearly 9 years.

19 In contrast, PAN’s apparent claim of prejudice regarding the timing of dispositive motions
 20 is without merit. The Court has considerable latitude in determining when to resolve issues of
 21 claim construction, including during summary judgment, at pretrial conference, or at trial.
 22 Further, there is no requirement in the Patent Local Rules, precedent, or this Court’s standing
 23 orders that filing dispositive and *Daubert* motions must occur after the claim construction hearing.
 24 And there is certainly no requirement that the Court issue its claim construction order before the
 25 deadline to file such motions. Further, PAN’s apparent claim of prejudice regarding its ability to
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 28 ¹ PAN mischaracterizes (at 1) its motion as a motion to change time “pursuant to Civil Local Rule
 6-3. Because PAN seeks relief from the Court’s Scheduling Order including continuing the trial
 date, the motion is instead subject to Civil Local Rules 7, 16, and 40.

1 file a renewed motion to strike Finjan's infringement contentions is without merit at least because
 2 such a motion would be untimely.

3 Finjan respectfully requests that the Court deny PAN's motion to change the case
 4 schedule, and maintain the current schedule including, the claim construction hearing on October
 5 26, 2023, deadline to file dispositive and *Daubert* motions on October 26, 2023, and trial on April
 6 8, 2024.

7 **II. STATEMENT OF RELEVANT FACTS**

8 Finjan filed this case nearly **9 years** ago, on November 4, 2014, asserting 10 patents
 9 against PAN. *See* Dkt. No. 1. In response, PAN filed 13 *inter partes* review ("IPR") petitions,
 10 and on December 10, 2015, Judge Hamilton stayed the litigation pending resolution of the IPRs.
 11 *See* Dkt. No. 67; *see also* Dkt. No. 69 (ordering that the stay remain in effect beyond institution
 12 until all final written decisions and appeals had been issued). **Five years** later, the IPRs and
 13 appeals on all of the asserted patents were concluded by December 16, 2020, with all but 3 of the
 14 198 challenged claims across all 10 asserted patents surviving. Judge Hamilton lifted the stay on
 15 January 25, 2021 (*see* Dkt. No. 84) and set the claim construction hearing for October 13, 2021 or
 16 October 14, 2021 (Dkt. No. 106).

17 The case was subsequently reassigned to this Court on August 9, 2021. Dkt. No. 150. The
 18 parties completed claim construction briefing by September 20, 2021, in accordance with the
 19 previously existing schedule and the Patent Local Rules. *See* Dkt Nos. 158, 159, 163, 164. A case
 20 management conference was set for October 21, 2021, and pursuant to this Court's request (*see*
 21 Dkt. No. 151), on October 14, 2021, the parties filed a joint case management statement, including
 22 competing proposed schedules. *See* Dkt. No. 171, Appx. A. On October 18, 2021, the Court
 23 rescheduled the case management conference for January 20, 2022. Dkt. No. 172. After
 24 conferring further, the parties agreed on a joint proposed schedule, and on January 13, 2022, filed
 25 a second joint case management statement. On January 14, 2022, the Court vacated the case
 26 management conference set for January 20, 2022 and said it would enter a scheduling order. Dkt.
 27 No. 181.

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1 On July 18, 2022, Finjan filed an opposed motion for a scheduling order. Dkt. No. 191.
 2 On August 23, 2022, the Court issued its Scheduling Order setting the claim construction hearing
 3 for April 11, 2023, the deadline for dispositive and *Daubert* motions as September 28, 2023, and
 4 trial for April 8, 2024—*which is nearly 10 years after this case was filed*. Dkt. No. 194. On
 5 February 15, 2023, the Court continued the claim construction hearing to May 11, 2023. Dkt. No.
 6 225. The Court continued the claim construction hearing a second time to June 1, 2023 and reset
 7 the deadline for dispositive and *Daubert* motions to October 26, 2023. Dkt. No. 228. The Court
 8 continued the claim construction hearing a third time to September 7, 2023 (Dkt. No. 247), and a
 9 fourth time, most recently, to October 26, 2023 (Dkt. No. 254).

10 PAN’s instant motion seeks to lengthen this case even more by moving the deadline for
 11 dispositive and *Daubert* motions by almost 4 months to February 14, 2024 and continuing the trial
 12 date by more than 7 months to October 28, 2024. Dkt. No. 194 at 2-3.

13 **III. ARGUMENT**

14 **A. PAN Has Not Shown Good Cause to Change the Schedule**

15 PAN has failed to show good cause for its unilateral request to move the trial date by more
 16 than 7 months from April 8, 2024 to October 28, 2024. According to the Court’s Standing Order,
 17 “[o]nce assigned, the trial date will not be changed or continued absent good cause in the interest
 18 of justice.” SO re Civ. Cases at ¶ 4; *see also* Fed. R. Civ. P 16(b)(4) (“A schedule may be
 19 modified only for good cause and with the judge’s consent.”). In this context, “good cause”
 20 means scheduling deadlines cannot be met despite [a] party’s diligence.” *Watkins v. MGA Ent., Inc.*,
 21 574 F. Supp. 3d 747, 759 (N.D. Cal. 2021); *see also id.* (quoting *Johnson v. Mammoth
 22 Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (“The district court may modify the pretrial
 23 schedule if it cannot reasonably be met despite the diligence of the party seeking the extension.”)).
 24 PAN does not assert that the parties cannot meet the deadlines in the current schedule. Instead,
 25 PAN’s argument for a 7-month delay is based entirely on alleged efficiency for the parties, burden
 26 on the Court, and prejudice to PAN. Because PAN has failed to even allege good cause, let alone
 27 show it, the Court should reject PAN’s request to change the schedule.

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1 The timing of the claim construction hearing does not provide good cause to again delay
 2 this case. Neither precedent nor the Patent Local Rules require the Court to amend the current
 3 case schedule so that dispositive and *Daubert* motions come after the claim construction hearing
 4 *and in view of* the Court's claim construction. "District courts 'have considerable latitude in
 5 de[ter]mining when to resolve issues of claim construction.'" *Droplets, Inc. v. Yahoo! Inc.*, No.
 6 12-CV-03733-JST, 2021 WL 9038351, at *2 (N.D. Cal. Apr. 30, 2021) (quoting *CytoLogix Corp.*
 7 *v. Ventana Med. Sys., Inc.*, 424 F.3d 1168, 1172 (Fed. Cir. 2005)). "A court may [] decide claim
 8 construction on summary judgment." *Droplets*, 2021 WL 9038351, at *2 (citing *Gentex Corp. v.*
 9 *Donnelly Corp.*, 69 F.3d 527, 530 (Fed. Cir. 1995)). A court may even decide claim construction
 10 at a pretrial conference or at trial. *Droplets*, 2021 WL 9038351, at *2 (citing *Pressure Prods.*
 11 *Med. Supplies, Inc. v. Greatbatch Ltd.*, 599 F.3d 1308, 1316 (Fed. Cir. 2010) and *Utah Med.*
 12 *Prods., Inc. v. Graphic Controls Corp.*, 350 F.3d 1376, 1381-82 (Fed. Cir. 2003)); *see also* *Mobile*
 13 *Hi-Tech Wheels v. CIA Wheel Grp.*, 514 F. Supp. 2d 1172, 1188-89 (C.D. Cal. 2007) (citing
 14 *Chem. Patents v. Lubrizol Corp.*, 64 F.3d 1553, 1555 (Fed.Cir.1995)) ("The only limitation on the
 15 district court is that the patent claims must be construed before the jury is instructed so that the
 16 Court can explain the scope of the claims to the jury."). Furthermore, this Court's standing orders
 17 do not require that dispositive and *Daubert* motions be filed and briefed after the claim
 18 construction hearing *and in view of* the Court's claim construction order.

19 **B. PAN's Proposed Changes to the Schedule Will Indeed Harm Finjan**

20 Contrary to PAN's assertion (at 4), its proposed change to the case schedule, including
 21 moving the trial date by 7 months, would harm Finjan. Finjan filed this case in October 2014.
 22 Dkt. No. 1. The case was subsequently stayed for **5 years** because PAN filed 13 IPRs against the
 23 asserted patent, which resulted in just 3 out of 198 challenged claims across 10 patents being
 24 found unpatentable. *See* Dkt. No. 171, App. B at vi. On August 9, 2021, the case was reassigned
 25 from Judge Hamilton to this Court. Dkt. No. 150. **One year** later, on August 23, 2022, the Court
 26 issued its Scheduling Order. Dkt. No. 194. All in all, this case has been pending for nearly
 27 **9 years**.

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1 The timing of this case is out of the norm for cases in this District. The Court's Standing
 2 Order for Civil Cases does require “[a]s a general rule, [that] counsel should budget no more than
 3 **18 months** between the initial case management conference and trial.” SO re Civ. Cases at ¶ 4
 4 (emphasis added). Trial in this case is scheduled for April 8, 2024, which is already more than **8**
 5 **years** after the initial case management conference held before Judge Hamilton on December 3,
 6 2015 prior to the stay (Dkt. No. 65), more than **3 years** after the further case management
 7 conference held before Judge Hamilton on March 18, 2021 after the stay was lifted (Dkt. No. 106),
 8 and more than **26 months** after the first case management conference before this Court was
 9 scheduled to occur on January 20, 2022 (Dkt. No. 181). PAN now requests the Court to move the
 10 trial to October 28, 2024, more than **33 months** after the Court's scheduled case management
 11 conference. The Court should reject PAN's request at least because it is nearly double the general
 12 rule set forth in the Court's Standing Order.

13 PAN argues (at 4) that “[t]he continuance of the parties' trial date would cause no
 14 prejudice to Finjan, and indeed, would allow Finjan, like PAN, to have a claim construction order
 15 in hand for its preparation for summary judgment and *Daubert* motions.” But Finjan is not asking
 16 for this. To be clear, Finjan is prepared to file and brief dispositive and *Daubert* motions as
 17 scheduled and without the benefit of the Court's claim construction order. Finjan is also prepared
 18 to handle claim construction at the pre-trial conference or at trial if the Court so chooses. PAN's
 19 requested change would harm Finjan by delaying Finjan's day in court yet another 7 months. For
 20 this reason alone, the Court should deny PAN's unilateral request to change the schedule.

21 C. **PAN Is Not Prejudiced by the Current Case Schedule**

22 PAN's apparent claim (at 3-4) that it is prejudiced under the current schedule because it
 23 does not allow PAN the opportunity to renew its motion to strike Finjan's infringement
 24 contentions before dispositive and *Daubert* motions is meritless at least because such motion
 25 would be untimely. Under Civil Local Rule 37-3, the deadline for “motions related to fact
 26 discovery,” including motions to strike infringement contentions, is 7 days after close of fact
 27 discovery. Fact discovery closed on December 23, 2022, so the deadline for PAN to file its
 28 renewed motion to strike Finjan's infringement contentions was December 30, 2022.

1 Accordingly, PAN should be precluded from renewing its motion to strike Finjan's infringement
 2 contentions at this advanced stage of the case.

3 Even if the Court's March 27, 2023 Order (Dkt. No. 232) is interpreted as an open-ended
 4 grant of leave for PAN to file a renewed motion to strike Finjan's infringement contentions out of
 5 time after the Court issues its claim construction order (which Finjan does not believe that it is),
 6 there is no guarantee that the Court would rule on such a motion before PAN's proposed deadline
 7 for filing dispositive and *Daubert* motions. Likewise, there is no deadline in PAN's proposed
 8 schedule that guarantees that the Court will issue its claim construction order before PAN's
 9 proposed deadline to file dispositive and *Daubert* motions. So despite the fact the PAN's
 10 proposed changes would continue the trial by more than 7 months, the case may end up back in
 11 the exact same posture that is now: no claim construction order before the deadline for dispositive
 12 and *Daubert* motions.

13 Thus, PAN is not prejudiced by the current schedule.

14 **IV. CONCLUSION**

15 For the reasons stated above, Finjan respectfully requests that the Court deny PAN's
 16 motion to change the case schedule.

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18 Dated: September 7, 2023

Respectfully Submitted,

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